BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CYNTHIA E. GEORGE	)	
Claimant	)	
	)	
VS.	)	
	)	
SNIP N CLIP	)	
Respondent	)	Docket No. 256,500
	)	
AND	)	
	)	
RELIANCE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Jon L. Frobish's Post Award dated July 15, 2002. This is a post-award proceeding for medical benefits. Both parties submitted briefs and the case was placed on the summary docket on September 4, 2002, for decision without oral argument.

APPEARANCES

Claimant appeared by her attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kip A. Kubin of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Board has considered the record listed in the Post Award.

ISSUES

This is an appeal from a post-award medical proceeding. The claimant requested post-award medical treatment pursuant to K.S.A. 44-510k. On November 14, 2001, claimant filed her Application for Post Award Medical.

The initial award was entered in this case by a Stipulation for Agreed Award signed by Administrative Law Judge Jon Frobish on May 30, 2001. The claim was for a series of

accidents culminating in an injury in December 1998. The stipulated award was for a 13 percent permanent partial disability to the body as a whole. Claimant retained the right to review and modification of the award and future medical treatment.

In the post-award proceeding, claimant sought medical treatment for a recurrence of symptoms in her hands and arms. Claimant argues that following her bilateral carpal tunnel surgery any activity causes her hands to hurt the same as before surgery. She further argues her current symptoms are a direct and natural consequence of the original 1998 work-related injury.

After the April 16, 2002, post-award hearing, the Administrative Law Judge (ALJ) found claimant's current complaints were related to work for a subsequent employer. However, the ALJ found the respondent is estopped from denying the claimant medical benefits for a condition which arose prior to the running award entered on May 30, 2001. Therefore, the ALJ found claimant's continuing problems were a direct and natural result of that condition and granted claimant's request for medical treatment. The ALJ also ordered respondent to pay claimant's attorney fees which, absent an itemization, the ALJ concluded should have taken 6 hours at $125 per hour for a total of $750.

On appeal, respondent contends claimant failed to prove her current medical condition was a direct and natural consequence of the 1998 work-related injury. Respondent argues the ALJ correctly determined claimant's current condition is the result of an aggravation which occurred during subsequent employment. Respondent further argues the ALJ incorrectly applied the doctrine of equitable estoppel to the facts of this case. Lastly, on appeal respondent argues for the first time that in the absence of an itemized statement regarding attorney fees there was no evidence upon which the ALJ could determine appropriate fees. Accordingly, respondent now argues it was error for the ALJ to base an award of attorney fees upon speculation regarding the appropriate time spent on the case. Respondent requests the Board to reverse the ALJ and deny claimant's request for medical treatment and attorney fees.

Claimant argues that her uncontroverted testimony and the medical evidence establishes that her current medical condition is the natural and probable consequence of her bilateral carpal tunnel injuries suffered while employed by respondent. In the alternative, claimant argues the ALJ's conclusion respondent is estopped from denying future medical treatment should be affirmed. Lastly, claimant argues the limited issue of the amount of attorney fees should be remanded for determination by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a hairstylist for respondent for 13 years. She gradually began experiencing pain, numbness and weakness in both hands in December 1998. She first sought treatment in January 2000 and was initially treated by Dr. Alvin Wolfe with medication and splints for her wrists. The claimant terminated her employment with respondent on March 21, 2000.

In May 2000 claimant was referred to Dr. J. Mark Melhorn for additional treatment. Nerve conduction testing revealed claimant had bilateral carpal tunnel syndrome. Dr. Melhorn continued conservative treatment including physical therapy for claimant's bilateral carpal tunnel syndrome. While receiving treatment from Dr. Melhorn, the claimant attempted to return to work as a hairstylist for Trade Secrets. She worked four hours and quit because of bilateral hand pain.

Dr. Melhorn ultimately recommended surgery. Claimant underwent a right carpal tunnel release on July 18, 2000, and a left carpal tunnel release on August 1, 2000. Dr. Melhorn released claimant from his care on September 28, 2000.

Claimant then obtained employment as a hairstylist with Super Cuts on October 5, 2000. After just a couple of days claimant again experienced pain in her hands which she described as the same as before she had surgery. The pain and numbness in her hands became more frequent, intensified and she quit her job with Super Cuts on December 23, 2000. Claimant also worked as a clerk at Smoker Friendly Outlet but the record is unclear the exact dates she worked for that employer other than from late December 2000 through mid-January 2001.

On May 30, 2001, a Stipulation For Agreed Award was signed by the ALJ. The claimant and respondent agreed to resolve this claim based upon a 13 percent permanent partial disability to the body as a whole. It was further provided: "That the Claimant is entitled to receive future medical treatment at the expense of the Respondent upon proper application to the Director, or by agreement of the parties."

In June 2001 claimant requested additional treatment for her hands and arms but did not receive any response to her telephone calls to the insurance carrier. On July 19, 2001, claimant's attorney sent respondent's counsel a seven-day demand letter requesting additional medical treatment with Dr. Siwek. Resolution of the issue was delayed because of confusion over the status of the insurance carrier.[1] On November 14, 2001, claimant filed an Application For Post Award Medical requesting additional treatment with Dr. Siwek.

[1] The insurance carrier, Reliance, had apparently gone into receivership and it is unclear from the record when the Kansas Insurance Guarantee Fund finally became responsible for this claim.

While waiting for resolution of her request for additional medical treatment, the claimant obtained employment as a clerk at Cigarette Outlet in December 2001 but she quit that employment in January 2002 because she again experienced pain in her hands.

Claimant complains of constant pain in both of her hands from the tips of her fingers to the elbow. With any task the symptoms return to the same level as before she had the surgeries. Her arms go to sleep and she is awakened in the night by the pain. At all of her employments after the surgery, when she attempted to work her symptoms would return to the same as she experienced before the surgery.

The claimant described the condition of her hands in the following manner:

> Q. So the job that you were doing at Cigarette Outlet made the condition of your hands worse?
>
> A. No. It was the same.
>
> Q. The same as what?
>
> A. The same as any time that I tried to do anything.
>
> Q. So as you would work, no matter what the job, you'd get more pain in your hands?
>
> A. The more I used them, yes.
>
> Q. Okay. So whenever you worked, whatever you were doing at the job seemed to aggravate your condition?
>
> A. It was really pretty much what I had experienced. The change was - - it was another attempt to try to do a simple job and I found out that I was not able to do it because of the pain.
>
> Q. Okay. Let's go back at it this way then. After doing your job at Cigarette Outlet you had more pain in your hands than you had before?
>
> MR. PHELPS: Before what?
>
> MR. KUBIN: Before going to work at Cigarette Outlet.
>
> A. I will say this. That nothing has changed. It doesn't matter what I do, whether I do things at home or do things at work. Nothing has changed. It's still the same.[2]

[2] P.A.H. Trans. at 19-21.

On April 24, 2002, Dr. Pedro A. Murati examined the claimant at the request of her attorney to determine whether claimant was in need of additional medical treatment. Dr. Murati had previously performed an evaluation of claimant on February 12, 2001, to provide a rating and restrictions.

Dr. Murati's examination on April 24, 2002, revealed claimant had residual pain status post bilateral hand carpal tunnel release, right ulnar cubital syndrome and right shoulder pain with mild crepitus. Dr. Murati noted the claimant's complaints of pain were substantially similar to her complaints when he examined her on February 12, 2001. Dr. Murati recommended treatment consisting of a repeat nerve conduction study, anti-inflammatory medication, pain medication, splinting and possible cortisone injections. Dr. Murati concluded if there was not any improvement with conservative care a surgical evaluation would be necessary.

In his report dated April 24, 2002, Dr. Murati opined claimant's current diagnoses were, all within reasonable medical probability, a direct result of the work-related injury claimant suffered beginning in 1998. However, at his deposition, Dr. Murati testified that most of claimant's current medical problems related back to the original injury she suffered while employed by respondent. But in a comparison of the physical findings from each examination the doctor noted claimant had improved findings in the latter examination in the two point discrimination testing, on the Weinstein monofilament testing, her shoulder crepitus improved, and her range of motion improved.

Dr. Murati also opined that a worsening of claimant's condition was demonstrated by weaker grip and ulnar issues that she had not previously demonstrated. Dr. Murati further opined that the ulnar problem developed after the doctor had examined the claimant in February 2001. Lastly, the doctor noted the medical treatment recommended would be appropriate based upon only a worsening of claimant's symptomatology.

The ALJ concluded respondent was estopped from denying additional medical treatment due to any alleged aggravation of claimant's condition which may have occurred during subsequent employment before the Stipulation For Agreed Award was entered on May 30, 2001. Stated another way, the ALJ concluded claimant had aggravated her condition while employed at Super Cuts after she was released from treatment by Dr. Melhorn. But because respondent was aware of that subsequent employment before the agreed award was entered, it was estopped to raise as a defense against future medical treatment any alleged aggravation that may have occurred during the subsequent employment.

The doctrine of equitable estoppel is applicable to workers compensation proceedings.[3] However, to rely upon such theory it must be established that the claimant

[3] *Marley v. M. Bruenger & Co. Inc.*, 27 Kan. App.2d 501, 6 P.3d 421, *rev. denied* __ Kan. __ (2000).

was, by the acts, representations, admissions, or silence of respondent when it had a duty to speak, induced to believe certain facts existed. Claimant must also show she rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts.[4]

The claimant never raised the estoppel defense during the post-award hearing. The evidentiary record does not contain any assertion by claimant that she changed her position regarding future medical treatment or potential causes of action against subsequent employers because of the Stipulated and Agreed Award. The Stipulated and Agreed Award merely provided claimant was entitled to future medical treatment upon agreement of the parties or after further hearing and award of additional treatment. Moreover, claimant was represented by counsel at the time the agreed award was entered.

The Board reverses the ALJ's finding that the doctrine of equitable estoppel prevents respondent from raising the issue of intervening accident under the facts of this case. The doctrine of equitable estoppel cannot be applied in this case because of the absence of any evidence claimant relied on the Stipulated and Agreed Award to change her position. There is nothing in the evidentiary record to support the conclusion claimant relied on the Stipulated and Agreed Award and believed she was automatically entitled to future medical treatment or that the Stipulated and Agreed Award prevented her from filing any alleged cause of action against subsequent employers. As previously noted, claimant made no such assertions at the post-award hearing.

K.S.A. 44-510k provides further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award.

The medical causation evidence in this case was provided by the claimant and Dr. Murati. Claimant testified her condition never improved following surgery. Instead, any activity, whether at home or at her abbreviated attempts at employment, would result in increased symptomatology which was the same as before the surgery. The claimant's testimony alone is sufficient evidence of the claimant's physical condition.[5] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[6]

When a primary injury under the Workers Compensation Act arises out of and in the course of the employment every natural consequence that flows from the injury is

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[4] Ibid.

[5] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P. 3d 1184, *rev. denied* ___Kan. ___ (2001).

[6] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

compensable if it is the direct and natural result of the primary injury.[7] The natural consequence rule applies only to a situation where a claimant's disability gradually increases from a preexisting compensable injury and not when the increase in disability results from a new and separate accident.[8]

In *Gillig*, claimant twisted his knee while getting off a tractor and his knee later locked up while he was watching television. The Kansas Supreme Court affirmed the district court holding that claimant's knee injury, that occurred some two years following a work-related knee injury, was the natural and probable consequence of the original injury. One of the factors the Kansas Supreme Court considered when it affirmed the district court holding that the original injury was ultimately responsible for the current surgery, was that claimant's original injury remained symptomatic and had not healed.

In addition, Dr. Murati in his report dated April 24, 2002, opined claimant's current diagnoses were the direct result of her work-related injury in 1998. At deposition, the doctor modified his opinion regarding the claimant's ulnar problems but repeated that in his opinion most of claimant's problems were the result of the 1998 injury.

Accordingly, the Board concludes the evidence supports a finding that claimant is entitled to additional medical treatment limited to her bilateral hand complaints. Because Dr. Murati noted the ulnar problems developed after he had examined the claimant in February 2001, claimant has failed to meet her burden of proof that the ulnar condition is related to her 1998 injury and treatment for that condition is denied.

The Board is not unmindful that the recurrence of symptoms followed claimant's attempted return to work as a hairstylist for a different employer. But claimant had only been released from treatment for approximately a week when she attempted to return to work and immediately had an onset of symptoms that were the same as she experienced before her surgery. While respondent argues that this was a new intervening injury, the facts indicate that her condition did not permanently worsen, as evidenced by Dr. Murati's findings in his April 24, 2002, examination. Instead, the evidence indicates that with any activity claimant would experience a recurrence of her symptoms. Stated another way, the claimant's condition did not improve after surgery and had not healed as demonstrated by the recurrence of symptomatology with any activity involving her hands.

Initially, claimant requested attorney fees based upon 6 hours at $150 per hour for a total of $900. The itemization of time was detailed as "6.0 hours - Consisting of preparation and filing of pleadings, letters, telephone conferences with client and Respondent's counsel, office conference with client and review of file and preparation for

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[7] *Gillig v. Cities Service Gas Co.,* 222 Kan. 369, Syl. ¶ 2, 564 P.2d 548 (1977).

[8] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan.260, 505 P.2d 697 (1973).

hearing appearance at hearing."[9] The itemization document, Claimant's Exhibit 6, was offered without objection at the post-award proceeding. At the conclusion of the hearing on claimant's request for post-award medical treatment, claimant's counsel asked the ALJ how to submit a supplemental exhibit for anticipated additional attorney time that would be spent to take medical depositions. The ALJ advised claimant's attorney: "You can submit it with your brief or whatever."[10]

After the deposition of Dr. Murati was taken and terminal dates expired, the claimant provided the ALJ with a submission letter dated June 24, 2002, which included a request for an additional 7 hours at $150 per hour or $1,050 in attorney fees. The request was detailed as "7.0 hours - Consisting of numerous telephone conferences with client, preparation for medical deposition, deposition of Dr. Murati, preparation of submission brief, review of file, preparation of correspondence."

The ALJ's Award stated claimant had requested 7 hours at $150 per hour or $1,050 for services rendered in the post-award proceeding. The ALJ then determined the request was deficient because claimant had not submitted an itemized accounting of the time spent and concluded an appropriate amount of time for this matter would be approximately 6 hours and awarded $125 per hour for a total of $750.

As previously noted, claimant not only requested 6 hours for the time spent up to and including the post-award hearing, but also requested an additional 7 hours for time spent after the post-award hearing. It is not clear from the ALJ's decision whether he discounted the previously requested 6 hours or, instead inadvertently failed to include and consider the previously submitted request.

Respondent now argues for the first time that the request for attorney fees should be denied because claimant failed to submit an itemized statement and did not provide respondent with medical evidence to support the claim for additional treatment until after the post-award hearing. While there is some merit to those arguments, nonetheless, there is also evidence that there was a considerable delay in respondent's response to claimant's initial request for additional treatment because of the confusion over the status of respondent's insurance carrier. This confusion contributed to the failure to exchange appropriate medical information regarding the claimant's request for additional medical treatment. In addition, the ALJ led claimant's counsel to believe at hearing that his explanation of time spent was sufficiently itemized when the ALJ failed to point out any deficiency in the initial exhibit when he advised claimant's counsel to submit a supplemental request with his brief. Thus implying, at least, that the form of the request

[9] P.A.H. Trans., Cl. Ex. 6.

[10] P.A.H. Trans. at 32.

submitted at hearing was sufficient. Upon a review of the entire record, the Board concludes it is appropriate to award claimant attorney fees in this case.

While the Board agrees that an award of attorney fees is appropriate, and further agrees that a detailed itemization is preferable to the general statement form used by claimant's attorney, nonetheless, when claimant's attorney asked the ALJ how to submit his billing for anticipated additional attorney time, the ALJ did not advise claimant's attorney that a more detailed itemization was required. Furthermore, there was no objection from respondent's counsel to the statement. In the absence of such an admonition or a timely objection to the time spent, the submitted itemization should not later be disregarded. The Board adopts the ALJ's finding that attorney fees are appropriate at the rate of $125 per hour but concludes that in this case, the claimant's attorney has established he spent 13 hours preparing and submitting this case for decision. Accordingly, the Board concludes claimant's attorney is entitled to 13 hours at $125 per hour or $1,625 in attorney fees.

Claimant now requests an additional 4 hours at $175 per hour or $700 for the time spent preparing a response brief to the Board. The respondent did not address this issue in its brief. K.S.A. 44-536(h) requires that any dispute regarding attorney fees "shall be heard and determined by the director, after reasonable notice to all interested parties and attorneys." The Board remands that issue for determination in accordance with the statutory mandate that such dispute be determined by hearing by the director, i.e., the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated July 15, 2002, granting medical treatment for claimant's bilateral hand symptomatology is affirmed, although for different reasons, but modified to award attorney fees in accordance with the foregoing findings of fact and conclusions of law.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation